Filed 5/22/19 Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ROY ALLAN SLURRY SEAL, INC., et al., Plaintiffs and Appellants, v. AMERICAN ASPHALT SOUTH, INC., Defendant and Respondent.	B289446 (Los Angeles County Super. Ct. No. JCCP 4768)

APPEAL from judgments of the Superior Court of Los Angeles County. Elihu Berle, Judge. Affirmed.

Doyle Schafer McMahon, Daniel W. Doyle and David Klehm, for Plaintiffs and Appellants.

Atkinson, Andelson, Loya, Ruud & Romo, Scott K. Dauscher, and Jennifer D. Cantrell, for Defendant and Respondent.

Plaintiffs Roy Allan Slurry Seal, Inc. and Doug Martin Contracting Co. appeal the judgments in five coordinated actions in favor of defendant American Asphalt South, Inc. (American). The trial court found that prior appellate decisions in one of the five cases barred plaintiffs' claims in the five actions. (*Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* (2015) 234 Cal.App.4th 748, review granted, May 14, 2015, S225398 (*Roy Allan I*),[1] rev. *Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* (2017) 2 Cal.5th 505 (*Roy Allan II*).) We agree and affirm.

BACKGROUND

The facts of this proceeding are set out in detail in both *Roy Allan I* and *Roy Allan II*, so we only briefly summarize them here. In lawsuits filed in five Southern California counties, plaintiffs alleged American unlawfully outbid them on 23 public works contracts by failing to pay prevailing wages and overtime compensation to its workers. Plaintiffs asserted three claims: (1) intentional interference with prospective economic advantage; (2) predatory pricing under the Unfair Practices Act (Bus. & Prof. Code, §§ 17000, 17043); and (3) injunctive relief under the Unfair Competition Law (Bus. & Prof. Code, § 17200). (*Roy Allan I, supra,* 234 Cal.App.4th at pp. 753–754.)

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[1] *Roy Allan I* is no longer published, but we may cite it for the purposes of deciding the law of the case, res judicata, and collateral estoppel issues raised in this appeal. (Cal. Rules of Court, rule 8.1115(b)(1).)

American demurred to all the complaints, resulting in conflicting rulings. In the Riverside County action, the trial court sustained American's demurrer without leave to amend, and plaintiffs appealed. One week later, our Supreme Court ordered all five matters coordinated in Los Angeles Superior Court and in the Second District Court of Appeal for appellate purposes. (*Roy Allan I, supra,* 234 Cal.App.4th at p. 753.)

In a published opinion, this Division affirmed the sustaining of the demurrer to the Riverside complaint as to the predatory pricing and injunctive relief claims, but reversed as to the intentional interference claim. In the disposition, we directed the trial court "to enter a new order overruling American's demurrer to plaintiffs' cause of action for intentional interference with prospective economic advantage, and to sustain the demurrers as to the causes of action for predatory pricing under the Unfair Practices Act and for an injunction under the unfair competition law." (*Roy Allan I, supra,* 234 Cal.App.4th at p. 772 [Rubin, Flier, Grimes dissenting.])

The California Supreme Court granted review limited to the intentional interference claim and reversed our judgment. For disposition, it remanded the matter "with directions that the original order sustaining the demurrer be reinstated." (*Roy Allan II*, *supra*, 2 Cal.5th at pp. 510 & fn. 1, 522.)

After remand, plaintiffs moved to amend the Los Angeles complaint in the coordinated action, arguing law of the case did not bar its predatory pricing and injunction claims. American opposed the motion, arguing that law of the case, res judicata, and collateral estoppel barred plaintiffs' claims, and the proposed amended complaint failed to state a claim and was a sham pleading. The court denied the motion primarily because

plaintiffs' claims were barred by law of the case. It also found plaintiffs' proposed amendment was barred by res judicata and collateral estoppel and because plaintiffs failed to state claims for relief.[2]

American moved for judgment on the pleadings in all the cases in the coordinated action, which the trial court granted. Adopting its rationale for denying plaintiffs' motion to amend, the court found plaintiffs' claims were barred and entered judgment for American in the five coordinated cases.[3]

DISCUSSION

"We independently review an order on a motion for judgment on the pleadings to determine whether the complaint states a cause of action. [Citation.] In doing so, we accept as true the plaintiff's factual allegations and construe them liberally. [Citation.] If the trial court's ruling on a motion for judgment on the pleadings is correct upon any theory of law applicable to the case, we will affirm it, even if we may disagree with the trial court's rationale." (*Stevenson Real Estate Services, Inc. v. CB*

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[2] Plaintiffs have not challenged on appeal the court's denial of leave to amend, so we will not address it.

[3] Plaintiffs have failed to provide the operative complaints in the consolidation actions as part of the record in this appeal. But we have before us a separate appeal from the denial of American's post-judgment request for attorney's fees, B291036. The appellant's appendix in that appeal contains all five operative complaints submitted as part of American's request for judicial notice in support of its motion for judgment on the pleadings. That record is applicable to this appeal. (Cal. Rules of Court, rule 8.147(a)(1); *Krug v. Maschmeier* (2009) 172 Cal.App.4th 796, 799, fn. 1.)

Richard Ellis Real Estate Services, Inc. (2006) 138 Cal.App.4th 1215, 1220.)

First, in their briefs on appeal, plaintiffs do not address their injunctive relief claim pursuant to the Unfair Competition Law. Instead, they expressly limit the issue on appeal to "whether any of the exceptions to the Law of the Case doctrine apply to this Court's prior decision regarding plaintiff's Second Cause of action for violation of the Unfair Business Practices Act." Plaintiffs have therefore abandoned their injunctive relief claim and we will not address it. (*Ryder v. Lightstorm Entertainment, Inc.* (2016) 246 Cal.App.4th 1064, 1080, fn. 11.)

For their predatory pricing claim, the trial court and the parties focus on law of the case as the applicable legal framework for determining whether the judgment in all five coordinated actions was proper. However, the doctrine arguably only applies to the Riverside action. " 'The doctrine of "law of the case" deals with the effect of the *first appellate decision* on the subsequent *retrial or appeal*: The decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal *in the same case*.' " (*Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491, last italics added; see *Searle v. Allstate Life Ins. Co.* (1985) 38 Cal.3d 425, 434 ["The rule of 'law of the case' generally precludes multiple appellate review of the same issue *in a single case*." (Italics added.)].) All five actions here were coordinated in Los Angeles Superior Court after plaintiffs appealed the judgment in the Riverside action, so only the Riverside action was the subject of the prior appellate decisions in *Roy Allan I* and *Roy Allan II*. (See *Roy Allan II, supra,* 2 Cal.5th at p. 510 ["Only the Riverside

tort action is at issue here."].) These cases were coordinated because they shared "a common question of fact or law" and because coordination "will promote the ends of justice" in various ways defined by statute. (Code Civ. Proc., §§ 404, 404.1). But the parties have cited no authority to suggest that coordination of complex actions merges them into the "same case" for the purpose of law of the case.

In any event, we need not apply law of the case to either the Riverside action or the other four coordinated actions because judgment was proper for other reasons. For the Riverside action, the trial court was *required* to enter judgment in favor of American based on the dispositions in *Roy Allan I* and *Roy Allan II*. "When an appellate court's reversal is accompanied by directions requiring specific proceedings on remand, those directions are binding on the trial court and *must* be followed. Any material variance from the directions is unauthorized and void. [Citations.] When, for example, 'a cause is remanded with directions to enter a particular judgment, it is the duty of the trial court to enter judgment in conformity with the order of the appellate court, and that order is decisive of the character of the judgment to which the appellant is entitled. The lower court cannot reopen the case on the facts, allow the filing of amended or supplemental pleadings, nor retry the case, and if it should do so, the judgment rendered thereon would be void.' " (*Butler v. Superior Court* (2002) 104 Cal.App.4th 979, 982; see *Hampton v. Superior Court* (1952) 38 Cal.2d 652, 655.)

In the Riverside action prior to coordination, the trial court sustained American's demurrer *without leave to amend*. Our disposition in *Roy Allan I* directed the trial court to enter an order overruling the demurrer as to the intentional interference

claim but "sustain the demurrers as to the causes of action for predatory pricing under Unfair Practices Act and for an injunction under the unfair competition law." (*Roy Allan I, supra,* 234 Cal.App.4th at p. 772.) In *Roy Allan II*, our Supreme Court remanded "with directions that the *original order* sustaining the demurrer be reinstated." (*Roy Allan II, supra,* 2 Cal.5th at p. 522, italics added.) Though neither disposition mentioned leave to amend, their effect was to reinstate the original order denying leave to amend, so the trial court had no authority after remittitur but to enter judgment for American in the Riverside action.

For the other four coordinated cases, judgment was proper because collateral estoppel, otherwise known as issue preclusion, barred the identical predatory pricing allegations in those complaints. Issue preclusion "prohibits the relitigation of issues argued and decided in a previous case." (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824 (*DKN Holdings*); see *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 (*Lucido*).) Issue preclusion applies "(1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party." (*DKN Holdings,* at p. 825.) "The party asserting collateral estoppel bears the burden of establishing these requirements." (*Lucido,* at p. 341.)

Plaintiffs only dispute the requirement that the issues be identical. They argue that the issue of the sufficiency of their predatory pricing allegations decided in *Roy Allan I* was not identical because, in their view, we held that only part of their allegations supporting their predatory pricing claim lacked specificity. We did hold that a portion of their allegations lacked

specificity, but we also held that their allegations in their entirety failed to state a claim. In *Roy Allan I*, we addressed the predatory pricing claim as follows:

"It is unlawful for a business to sell its goods and services below cost with the intent of harming competition. (Bus. & Prof. Code, § 17043 ['It is unlawful for any person engaged in business within this State to sell any article or product at less than the cost thereof to such vendor, or to give away any article or product, for the purpose of injuring competitors or destroying competition.']; § 17024 defines 'article or product' to include service.) Here, plaintiffs allege American engaged in predatory pricing by providing its repaving and road repair services below cost. American demurred to the cause of action on the grounds that its alleged failure to pay the prevailing wage did not result in predatory pricing because its lower wages also lowered its costs.

"Plaintiffs' cause of action for predatory pricing misses the mark. Plaintiffs alleged that American could underbid them because American did not pay its employees the prevailing wage. The logic of plaintiffs' complaint was not that American provided its service below cost, but that American unlawfully reduced its costs by not paying the prevailing wage, and by doing so could underbid plaintiffs. Selling below cost is predatory pricing, but lowering one's costs is not. (Bus. & Prof. Code, § 17043 ['It is unlawful for any person engaged in business within this State to sell any article or product at less than the cost thereof . . . .'].) On the other hand, to the extent plaintiffs' allegation was that American was incurring and paying other costs, such as workers' compensation and health and pension benefits, which its underbid did not recover—and thus by implication American was

selling its services below cost—the allegation lacks the required specificity. [Citations.]" (*Roy Allan I, supra,* 234 Cal.App.4th at p. 771.)

As is apparent from this excerpt, we adjudicated the sufficiency of all of their allegations supporting their predatory pricing claim. Plaintiffs do not argue that the substantive allegations for this claim varied among the five complaints. We have reviewed the complaints and, except for the amount of damages, the allegations are the same. The issue of the sufficiency of these allegations was therefore identical and satisfied this requirement of issue preclusion.

The remaining requirements for issue preclusion are also met. The sufficiency of plaintiffs' predatory pricing allegations was actually litigated and necessarily decided in *Roy Allan I*, and the parties were identical. Although the judgment in the Riverside action is not technically final since it is part of this appeal, "for purposes of issue preclusion, as opposed to res judicata, ' "final judgment" includes *any* prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.' " (*Border Business Park, Inc. v. City of San Diego* (2006) 142 Cal.App.4th 1538, 1564 (*Border Business Park*).) We have concluded above that the trial court had no authority on remand other than to enter judgment in the Riverside action, so after *Roy Allan I* and *Roy Allan II* the order sustaining the demurrer without leave to amend was sufficiently firm to preclude further litigation. (*Border Business Park,* at p. 1565 ["A prior adjudication of an issue in another action may be deemed 'sufficiently firm' to be accorded preclusive effect based on the following factors: (1) whether the decision was not avowedly tentative; (2) whether the parties were fully heard;

(3) whether the court supported its decision with a reasoned opinion; and (4) whether the decision was subject to an appeal."].)

DISPOSITION

The judgments in the coordinated actions are affirmed. American is awarded its costs on appeal.

BIGELOW, P. J.

We concur:

GRIMES, J.

STRATTON, J.